

Agenda Item: 4a Legal Update
Meeting Date: April 28-29, 2011

The Delta Smelt Consolidated Cases

On **March 29, 2011**, Judge Wanger entered a final judgment in the Delta Smelt Consolidated Cases

Previously, the Court issued a memorandum decision (December 2010) holding that the biological opinion is unlawful and remanding it to the Service for further consideration

The final judgment describes what the federal agencies must do to cure the defects identified in December.

The order provides deadlines for the federal agencies to follow:

By **October 11, 2011**, USFWS must complete a new BiOp and RPA, except for certain written findings that are due on **November 30, 2011**.

Bureau of Reclamation is then required to complete NEPA review for the RPA by **December 15, 2011**.

The current settlement agreement will be in effect through **June 30, 2011**.

Appeal of Final Judgment

NRDC and bay institute (defendant-intervenors) filed notice of appeal with 9th circuit in this smelt case on **April 7, 2011**.

Federal defendants cannot file appeal until it is approved by the Solicitor General of the United States.

Motion to alter or Amend the Judgment Or in the alternative for stay

Filed **April 8, 2011**

Federal defendants claim that it is not possible to comply with the terms of the judgment and the timeline established in the final judgment. (Smelt final judgment - March 29)

Asks court to amend the remand dates:

The soonest the federal defendants could comply with NEPA, the terms of the court's judgment, and the courts December 14, 2010 opinion is **May, 1 2014**.

In the alternative, asks the court to stay the effect of the judgment pending appeal so that federal defendants can seek relief from the deadlines in the Court of Appeals. (Notice of appeal filed by defendant-intervenors on April 7).

Wanger will hear motion to change the order, or issue stay pending appeal on **April 27, 2011**.

Commerce Clause Challenge (*San Luis & Delta-Mendota Water Authority v. Salazar*)
9th circuit - **March 25, 2011**

Court finds that application of the Endangered Species Act to the Delta Smelt does not violate the Commerce Clause of the U.S. Constitution.

The court concluded that the protection of endangered and threatened species (including wholly intrastate species such as the delta smelt) bears a “substantial relation” to interstate commerce.

The Consolidated Salmon Cases

Plaintiffs sought a preliminary injunction to enjoin the implementation of certain components (Action IV.2.1) of the National Marine Fisheries Service’s (NMFS) RPA.

Action IV.2.1 calls for exports to be restricted as necessary to achieve certain flow-export ratios at Vernalis on the San Joaquin River.

Hydrologic conditions have been favorable enough to avoid restrictions on exports.

Action IV.2.1 is technically in effect (between April 1 and May 31), but it will not actually result in restricted exports unless flows fall below a certain levels.

Because there has been no need to restrict exports yet this month, there is no action to enjoin.

On **March 30, 2011** the contractors withdrew their request for an injunction.

Should Delta exports be restricted later this spring because flows drop too low, the contractors may still revive their request for an injunction.

DWR Eminent domain / Inverse condemnation

In Re: Department of Water Resources Cases **April 8, 2011**

Department of water resources filed petitions against private landowners seeking entry for geological studies to gather information for the Bay Delta Conservation Plan (BDCP).
(information for conveyance options / alternatives)

Geological activities that DWR proposed included Boring and filling with bentonite grout.

DWR sought access via the pre-condemnation statutes.

The court **DENIED** DWR's petition seeking entry.

The Court determined that DWR's activities resulted in the "taking" or "damaging" of private property within the meaning of the California Constitution, and a "taking" under the federal Constitution.

The Court held that the proposed activity exceeded the authority provided in the statutes.

The denial of DWR's petition is a potential temporary setback for the BDCP process.

DWR may still seek review of the denial.

Otherwise, DWR will have to negotiate with landowners for access to the various properties or seek the necessary easements through eminent domain.

Foothill Conservancy, et al. v. East Bay MUD, et al.

Sacramento Superior Court Decision - April 11, 2011

Challenge under CEQA to East Bay Municipal District's approval and certification of a program-level environmental impact report for the update to its "Water supply Management Program" plan. (EIR certified in 2009)

The Plan presents a "Preferred Portfolio" to meet water supply needs, which includes dry-year rationing, conservation measures, recycled water programs, and supplemental water supply projects including expansion of the Pardee Reservoir and Lower Bear Reservoir.

Lawsuit alleges that EBMUD failed to adequately evaluate the potential impacts of the proposed project (in particular, failed to adequately analyze and mitigate the environmental impacts of the potential reservoir expansions), and failed to adequately evaluate alternatives.

1) District's plan is NOT exempt from CEQA review

The court determined that CEQA did require the district to prepare an EIR evaluating the environmental impacts of the Plan.

By adopting the water supply plan, the district committed itself to a specific programmatic direction. (more than just a feasibility study)

District may not have committed to any particular supplemental supply component, but it did make a choice to implement one or more of the "preferred" supplemental supply options.

2) Impacts and mitigation analysis is NOT sufficient

Under CEQA, an EIR's project description must describe the "whole of the action" which is being approved, including all components and future activities that are reasonably anticipated to become part of the project.

Here, the district considered a range of specific supplemental water supply components, rejected components that did not meet the district's objectives and selected a "preferred portfolio" of solutions to be included as part of the plan.

The district has made a choice to advance its "preferred" water supply options. Thus, the court finds that the district was required to evaluate the "preferred" water supply components in the EIR.

Due to the broad, programmatic nature of the District's water Supply Plan and the flexible and uncertain nature of the supplemental water supply components, the District was not required to conduct a comprehensive, site-specific analysis of the individual water supply components in its program-level EIR. The district merely was required to include a general

discussion of the potential environmental impacts of the “preferred” water supply components.

EBMUD **failed** to include sufficient information about potential impacts that could result from implementation of the reservoir expansion components of the Plan.

In particular, the Court noted the EIR acknowledges that reservoir expansion would result in inundation of a portion of the Mokelumne River. Yet, the EIR did not adequately describe and mitigate for the potential impacts of that inundation on recreational and cultural resources, and public safety.

3) District did NOT prepare an adequate analysis of reasonable alternatives

EIR is required to include an in depth discussion of a reasonable range of alternatives identified as at least “potentially feasible.”

Plan eliminated an alternative as infeasible due to uncertainty about the possible alternative project. (Specifically, the Los Vaqueros Reservoir project.)

District cannot arbitrarily exclude potential water supply options merely because they are not fully defined or certain.

An EIR is required to ensure that all reasonable alternatives to a proposed project are thoroughly assessed.

Here, in addition to the required “no project” alternative, the EIR considered 5 alternative “portfolios”.

The court held that there was not sufficient variation to permit a reasonable choice of alternatives.